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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Appellant, v. GERARDO SEDANO, Defendant and Respondent.	B207152 (Los Angeles County Super. Ct. No. BA328558)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara R. Johnson, Judge. Remanded with directions.

Steve Cooley, District Attorney, Brentford Ferreira and Gilbert S. Wright, Deputy District Attorneys, for Plaintiff and Appellant.

Michael P. Judge, Public Defender, Albert J. Menaster, Ruchi Gupta and Robin Bernstein-Lev, Deputy Public Defenders for Defendant and Respondent.

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The People appeal the trial court's imposition of a misdemeanor sentence for a "wobbler" which had been charged as a felony. The People also challenge a prison sentence imposed pursuant to a gang enhancement that was not charged.

We conclude the trial court engaged in improper plea bargaining when it offered to sentence Sedano pursuant to the uncharged enhancement and that the court failed to properly exercise its discretion when it reduced the level of the offense from a felony to a misdemeanor. We vacate the judgment and remand for appropriate further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Gerardo Sedano was charged with vandalism in an amount over $400 (Pen. Code § 594, subd. (a)) and disobeying a court order (Pen. Code, § 166, subd. (a)(4)).[1] This form of vandalism can be charged as either a felony or a misdemeanor, and the People charged it as a felony. The People also alleged a section 186.22, subdivision (b)(1) (§ 186.22(b)(1)) gang enhancement as to the vandalism.[2] Section 186.22(b)(1) adds up to four years to a felony sentence where the underlying felony is not serious or violent. Sedano initially pled not guilty.

At the preliminary hearing, Police Officer Manuel Segura testified he saw Sedano run southbound on Olympic Boulevard, holding a can of silver aerosol paint. Sedano

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[1] Undesignated statutory citations are to the Penal Code.

[2] Section 186.22(b)(1) provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows: [¶] (A) Except as provided in subparagraphs (B) and (C), the person shall be punished by an additional term of two, three, or four years at the court's discretion. [¶] (B) If the felony is a serious felony, as defined in subdivision (c) of Section 1192.7, the person shall be punished by an additional term of five years. [¶] (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years."

stopped and wrote several monikers and "VNE," which stands for Varrio Nuevo Estrada, on a brick wall at two different addresses on the 3200 block east of Olympic Boulevard.

Officer Jose Vasquez testified that Sedano is a member of the VNE gang, which is very territorial. The gang marks its territory by spray-painting graffiti on walls and buildings, in an effort to gain prestige and respect in the neighborhood. In Vasquez's opinion, Sedano committed the vandalism to benefit and promote the gang. Sedano had admitted to being a member of the VNE gang and had a tattoo of the letters VN. The location where Sedano painted the graffiti falls within the safety zone of an injunction against the VNE gang that had been served on Sedano.

A probation officer's report indicated that when Sedano was a juvenile, the court sustained a petition for battery. As an adult, Sedano suffered the following convictions: (1) six counts of contempt of court; and (2) driving without a license. The report also showed that on August 18, 2004, Sedano possessed a controlled substance for which he received probation and his probation was revoked several times.

Just prior to the plea, even the defense acknowledged that Sedano would be sentenced to state prison on his violation of probation. As to the present case, defense counsel noted the prosecutor had declined to add a section 186.22, subdivision (d)[3] gang

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[3] Section 186.22, subdivision (d) provides: "Any person who is convicted of a public offense punishable as a felony or a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years, provided that any person sentenced to imprisonment in the county jail shall be imprisoned for a period not to exceed one year, but not less than 180 days, and shall not be eligible for release upon completion of sentence, parole, or any other basis, until he or she has served 180 days. If the court grants probation or suspends the execution of sentence imposed upon the defendant, it shall require as a condition thereof that the defendant serve 180 days in a county jail."

Section 186.22, subdivision (d) is an alternate penalty provision. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 897.) It permits an alternate sentence when the

enhancement. Defense counsel then urged the court to either reduce the vandalism to a misdemeanor or strike the section 186.22(b)(1) allegation. The court intiated an off-the-record discussion, after which the following exchange occurred:

> "THE COURT: Back on the record. [¶] It is my understanding, Mr. Sedano, that -- well, I want you to understand that *the court is going to* reduce the 594 pursuant to 17(b) to a misdemeanor since it is a wobbler and sentence you to two years on the allegation of the 186.22(b)(1) with your admission of that, but pursuant to 186.22(d), which is low term. [¶] All right. You may take the plea.
>
> "MR. MUELLER: Okay. [¶] Your Honor, before we do, just for the record, this is a plea over the People's objection.
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> "THE COURT: Yes.
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> "MR. MUELLER: I do believe that everyone agrees that this is a state prison case.
>
> "THE COURT: Correct.
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> "MR. MUELLER: The only reason that the court is asking us to do this is to circumvent the 186.22 allegations.
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> "THE COURT: Well, I'm not asking you to do anything because I'm taking the open plea. So you're not doing anything, but except he's pleading to everything on the sheet.
>
> "MR. MUELLER: But it is the People's understanding that this is, in essence, in order to circumvent the Three-Strikes law for the purpose of not having the strike. The People have offered a state-prison offer.
>
> "THE COURT: Well, the purpose is because it's, I believe, in my opinion, that it's a reduceable offense. Whether that avoids the Three-Strikes provision, that's a side issue.
>
> "MR. MUELLER: But as the defense has just indicated off the record that the point here is so that this defendant does not have to suffer a strike. And he does have two probation cases. He's got prior convictions for violation of a court order, gang injunctions. [¶] And just for the record, the People are not going to add a [section 186.22] (d) count just to prevent this defendant from suffering a strike.
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> "THE COURT: He's going to be sentenced on his probation violation.

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underlying offense is committed for the benefit of, or in association with, a criminal street gang. (*Id.* at p. 899.)

"MR. MUELLER: Yes. [¶] Does the court wish us to take the plea?

"THE COURT: Please." (Italics added.)

Sedano then pled no contest. The court declared the vandalism a misdemeanor, relying on section 17, subdivision (b) (§ 17(b)).[4] The court sentenced Sedano to 365 days in jail for the vandalism count. Over the People's objection, the court sentenced Sedano to a concurrent two-year prison term pursuant to section 186.22, subdivision (d), which had not been charged or admitted. Sedano also was sentenced to a concurrent six-month jail term for the violation of a court order (§ 166, subd. (a)(4)). The court sentenced him to two years in prison for violation of probation in case No. BA258374 to be served concurrently. The court terminated probation in case No. BA216952. The total sentence imposed exceeded the 16-month sentence offered by the People in return for Sedano's guilty plea to the original charges.

The People objected to the plea and timely appealed.[5]

DISCUSSION

The People have the right to challenge the sentence on appeal. The trial court's decision to reduce Sedano's felony conviction to a misdemeanor was a modification of the felony offense to a lesser offense. (*People v. Statum* (2002) 28 Cal.4th 682, 692.) Section 1238, subdivision (a)(6) authorizes the People to appeal from "[a]n order modifying the verdict or finding by reducing the degree of the offense or the punishment imposed or modifying the offense to a lesser offense."

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4 Section 17(b) provides in pertinent part: "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison. . . ."

5 The fact that Sedano is now on parole does not foreclose this appeal. (*People v. Statum, supra,* 28 Cal.4th at pp. 695-697.)

I.

We first consider the trial court's reduction of the wobbler from a felony to a misdemeanor under section 17(b). We review the sentencing choice for abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 981 (*Alvarez*) [appellate court bound by deferential and restrained standard of review].) "'[A] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*Id.* at p. 978.)

Post-"Three Strikes" law, a trial court retains the authority to reduce the level of a wobbler offense from a felony to a misdemeanor. (*Alvarez*, *supra*, 14 Cal.4th at p. 979.) The relevant criteria in exercising that discretion include "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*Id.* at p. 978.) "[E]ven under the broad authority conferred by section 17(b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.' [Citations.]" (*Ibid.*)

In *People v. Dent* (1995) 38 Cal.App.4th 1726 (*Dent*), the court held that a trial court abused its discretion in declaring a wobbler a misdemeanor when that discretion was exercised solely to avoid the consequences of the Three Strikes law. (*Id.* at p. 1731.) The determination of whether an offense can be a misdemeanor "can be properly made only when the sentencing court focuses on considerations that are pertinent to the specific defendant being sentenced, not an aversion to a particular statutory scheme." (*Ibid.*)

In contrast to *Dent*, the trial court in this case expressed no vocal antipathy towards the Three Strikes law. However, the court's motivation at best is uncertain. Following off-the-record discussions, the prosecutor asserted, in effect, that the court was attempting to impose a prison sentence, yet prevent future use of the vandalism as a strike prior. On this record, we cannot determine whether the court acted because of the nature of Sedano's offense or because of a desire to avoid the implications of the Three Strikes law. As the People point out, the court reduced the vandalism to a misdemeanor, then, in

effect, increased it to a felony under section 186.22, subdivision (d), without providing any rationale for these contrary sentencing choices. In addition, the court's sentence of two years is greater than the 16-month sentence offered by the People in return for Sedano's plea to felony vandalism.

Assuming that the court did not act to avoid the Three Strikes law, the court provided no explanation for its sentencing decision. Sedano's argument that the court considered motions, held pretrial conferences, and had available his probation report is unpersuasive because it does not show that the court considered the criteria relevant to sentencing. The record does not reflect that the court considered the nature of the offense, the nature of the offender or the public interest when it reduced Sedano's crime from a felony to a misdemeanor. The trial court abused its discretion by failing to consider the relevant criteria as the record reflects no reasoned consideration of the individual factors of this case. (See *Alvarez, supra,* 14 Cal.4th at p. 980.)

II.

As the People argue, the trial court has no authority to substitute itself as the representative of the state in the plea bargaining process. (*People v. Orin* (1975) 13 Cal.3d 937, 943.) A lawful plea bargain is premised on a negotiation between the People and the defendant. (*Id.* at p. 942; see also *People v. Allan* (1996) 49 Cal.App.4th 1507, 1514.) "'[I]mplicit in all of this is a process of "bargaining" between the adverse parties to the case—the People represented by the prosecutor on one side, the defendant represented by his counsel on the other—which bargaining results in an agreement between them. [Citation.]' [Citations.]" (*People v. Segura* (2008) 44 Cal.4th 921, 930.) Judicial plea bargaining exceeds the court's jurisdiction. (*People v. Turner* (2004) 34 Cal.4th 406, 418.)

In *People v. Smith* (1975) 53 Cal.App.3d 655, a trial court improperly encroached upon the prosecutor's function by allowing the defendant to plead to an uncharged battery where assault by means of force likely to produce great bodily injury was alleged. (*Id.* at pp. 657, 659.) "The court acted beyond its authority in accepting a plea of guilty

to a lesser nonincluded but related offense over the prosecutor's objection." (*Id.* at p. 660.)

Here, the trial court improperly negotiated a plea bargain when it proposed that, if Sedano admitted the charges, the court would sentence him under the uncharged section 186.22, subdivision (d). The court exceeded its jurisdiction by adding an uncharged allegation over the People's objection, with no apparent purpose other than to allow the defendant to avoid admitting a charge that could be used as a strike in the event of a later felony. The court effectively reduced the charges in return for appellant's plea. (*People v. Turner*, *supra*, 34 Cal.4th at p. 418.)

DISPOSITION

The judgment is vacated and the case is remanded to the trial court, which is directed to permit Sedano the opportunity to withdraw his plea upon proper motion. In the event Sedano chooses not to withdraw his plea, the trial court is directed to reevaluate whether to reduce the vandalism charge to a misdemeanor, explain its reasons if it does reduce the charge, and resentence Sedano consistent with this opinion.

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ONEILL, J.*

WE CONCUR:

FLIER, Acting P. J. BIGELOW, J.

* Judge of the Ventura County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.